

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RED BARN MOTORS, INC., PLATINUM)
MOTORS, INC., and MATTINGLY AUTO)
SALES, INC., individually and on behalf of)
other members of the general public similarly)
situated,)

Plaintiffs,)

v.)

COX AUTOMOTIVE, INC., NEXTGEAR)
CAPITAL, INC. F/K/A DEALER SERVICES)
CORPORATION, successor by merger with)
Manheim Automotive Financial Services, Inc.,)
and JOHN WICK,)

Defendants.)

Case No. 1:14-cv-01589-TWP-DKL

DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITY
REGARDING CLASS CERTIFICATION

Plaintiffs have filed a Motion for Class Certification and Appointment of Class Counsel (Doc. 153) ("Class Motion") in this matter. Recently, and months after the close of briefing on that Class Motion, Plaintiffs also moved the Court for summary judgment on their contract claim, squarely asserting for the first time that the relevant contracts are ambiguous with respect to the date interest may commence. *See* Plaintiffs' Motion for Partial Summary Judgment on Breach of Contract Claim (Doc. 194) and Memorandum in Support (Doc. 195), *passim*. Both motions remain pending. In light of Plaintiffs' ambiguity argument, and without conceding it, Defendants hereby request leave to file this notice, bringing to the Court's attention the following additional authority relevant to the Court's class certification determination:

- *University of Southern Indiana Foundation v. Baker*, 843 N.E.2d 528, 535 (Ind. 2006)
("[T]he latent/patent distinction has not been consistently applied and no longer

- serves any useful purpose. . . . [W]here an instrument is ambiguous, all relevant extrinsic evidence may properly be considered in resolving the ambiguity.”)
- *Tender Loving Care Management, Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014) (extrinsic evidence includes “evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement”)
 - Ind. Code § 26-1-1-205(4) (extrinsic evidence may include evidence of course of dealing and course of performance between the parties)
 - *Avritt v. Reliastar Life Insurance Co.*, 615 F.3d 1023, 1030 (8th Cir. 2010) (“liability to the entire class for breach of contract cannot be established with common evidence” where ambiguity has “open[ed] the door for extrinsic evidence”)
 - *Adams v. Kansas City Life Insurance Co.*, 192 F.R.D. 274, 282 (W.D. Mo. 2000) (“By allowing extrinsic evidence of the parties’ dealings, the breach of contract claims become individualized and not reasonably susceptible to class action treatment.”)

Respectfully submitted, this 15th day of May, 2017.

s/ Tracey K. Ledbetter

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record via the Court's electronic service notification system, this 15th day of May, 2017:

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